SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 582

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JAMES L. RANKIN, EXECUTOR OF THE ESTATE OF RICHARD B. TURNER, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Before United States Board of Tax Appeals

Docket No. 53554

RICHARD B. TURNER

Amended by order of 9/23/32 to read:

JAMES L. RANKIN AS EXECUTOR OF ESTATE OF RICHARD B. TURNER

Amended by order of 10/4/32 to read:

ESTATE OF RICHARD B. TURNER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:
For petitioner: James Craig Peacock, Esq.;
For respondent: J. M. Morawski, Esq., Prew Savoy, Esq.

Docket entries

Mar. 9, 1931—Petition received and filed. Taxpayer notified. (Fee paid.)
Mar. 9, 1931—Copy of petition served on general counsel.
Apr. 11, 1931—Answer filed by general counsel.
Apr. 16, 1931—Copy of answer served on taxpayer—General calendar.
Mar. 17, 1932—Hearing set April 27, 1932.
Apr. 27, 1932—Hearing had before Mr. Smith, division 5, on merits. Stipulation of facts read into record. Submitted to Mr. Smith. Suggestion of death and motion to substitute filed and granted. Petitioner's brief due in 45 days—none for Commissioner. Motion to amend petition filed—granted.
Apr. 27, 1932—Motion to substitute Estate of Richard B. Turner filed at hearing and granted.
June 1, 1932—Motion for 30 days extension after receipt of transcript to file brief filed by taxpayer.
June 2, 1932—Motion granted.
July 12, 1932—Transcript of hearing 4/27/32 filed.
Aug. 5, 1932—Stipulation for correction of transcript filed by taxpayer.
Aug. 5, 1932—Brief filed by taxpayer.
Sept. 23, 1932—Order amending caption of petition to read "James L. Rankin, Executor of Estate of Richard B. Turner", entered.
Oct. 4, 1932—Order to vacate order of Sept. 23, 1932, and that the caption of petition read "Estate of Richard B. Turner" as granted in motion of April 27, 1932, entered.
Oct. 14, 1932—Findings of fact and opinion rendered—Mr. Smith, division 5. Judgment will be entered for the Commissioner.
Oct. 17, 1932—Decision entered—Mr. Smith, division 5.

Jan. 6, 1933—Petition for review by Court of Appeals of D. C., with assignments of error filed by taxpayer—proof of service thereon.
Jan. 6, 1933—Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer—proof of service thereon.
Jan. 6, 1933—Statement of evidence lodged.
Jan. 6, 1933—Notice of lodgment of statement and of hearing Jan. 18, 1933, to approve statement filed.
Jan. 18, 1933—Hearing had before Mr. Smith, division 5, on approval of statement of evidence—statement of evidence approved.
Jan. 19, 1933—Præcipe with proof of service thereon filed (Court of Appeals).
Jan. 23, 1933—Statement of evidence approved and ordered filed.
Jan. 31, 1933—Transcript of hearing Jan. 18, 1933, filed.
Feb. 13, 1933—Transcript of record *sur* petition for review delivered to counsel for taxpayer.
Mar. 3, 1933—Motion for six months continuance to transmit and deliver record filed by taxpayer.
Mar. 3, 1933—Order enlarging time to Sept. 7, 1933, for preparation of evidence and delivery of record entered.
Sept. 5, 1933—Motion for 6 months extension to complete record filed by taxpayer.
4 Sept. 5, 1933—Order enlarging time to 3/7/34 for preparation of evidence and delivery of record entered.
Jan. 22, 1934—Mandate from Court of Appeals of D. C. dismissing petition for review filed.
Jan. 27, 1934—Præcipe with proof of service thereon filed by taxpayer.

5 Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed March 9, 1931

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:B-1 ARM-60D, dated January 29, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with principal office at 8 West Sixth Street, Chester, Pennsylvania.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on January 29, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928 and for $11,173.05.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including in petitioner's income any amount in excess of $25,933.50 on account of profits on
6 sales in 1928 of United Gas Improvement common stock (hereinafter referred to as U. G. I. stock).

(b) The Commissioner erred in holding that because petitioner's records fail to specify the sales as applying to any particular parcel of stock sold the evidence therefore indicates that the identity of the shares sold cannot be determined.

(c) The Commissioner erred in using the cost of the earliest purchases as the proper basis for computing gain on the shares sold.

(d) The Commissioner erred in not using the cost of the stock received as a stock dividend in 1926 as the basis for computing gain on the shares sold on May 8, 1928.

(e) The Commissioner erred in not using the cost of the shares purchased June 8, 1928, as the basis for computing gain on the shares sold on October 22 and November 7, 1928.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During 1926 petitioner bought 1,200 shares of United Gas Improvement Company common stock on margin through West & Company, a firm of stock brokers in Philadelphia, Pa., for $117,202.50.

(b) On November 22, 1926, a stock dividend of 25 percent was paid, so that on December 31, 1926, petitioner's account with West & Company showed 1,500 shares of U. G. I. stock long.

(c) During 1927 petitioner had no transactions in U. G. I. stock or any other stock, and at December 31, 1927, his account similarly showed 1,500 shares of U. G. I. stock long.

7 (d) On May 8, 1928, petitioner sold for $44,619 the 300 shares of U. G. I. stock which he had received as a stock dividend in 1926.

(e) On May 31, 1928, his account with West & Company showed 1,200 shares of U. G. I. stock long, and no other shares of any other stock long or short.

(f) On June 8, 1928, petitioner bought for $143,225, on margin in the same account 1,000 shares of U. G. I. stock.

(g) On October 22, 1928, petitioner sold for $73,865, half (i. e. 500 shares) of the 1,000 shares which he purchased on June 8, 1928.

(h) On November 7, 1928, petitioner sold for $74,115 the remaining 500 shares of the 1,000 shares which he bought on June 8, 1928.

(i) On December 31, 1928, petitioner still held the original 1,200 shares of U. G. I. stock which he had purchased in 1926.

(j) In the deficiency letter the respondent included in petitioner's income for 1928 $92,864 as the profit on the sale of the 1,300 shares of U. G. I. stock which petitioner sold during 1928.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the profit to be included in petitioner's income for 1928 on account of sales of U. G. I. stock should be re-

duced from $92,864, as determined by the Commissioner, to not more than $25,933.50, and that the deficiency proposed by the Commissioner should be correspondingly redetermined.

JAMES CRAIG PEACOCK,
Counsel for Petitioner,
1366 National Press Bldg., Washington, D. C.

8 [*Duly sworn to by Richard B. Turner, jurat omitted in printing.*]

Exhibit A to petition

TREASURY DEPARTMENT,
Washington, January 29, 1931.

Office of Commissioner of Internal Revenue. Address reply to Commissioner of Internal Revenue, and refer to IT:AR:B-1 ARM-60D.

Mr. RICHARD B. TURNER,
511 Welsh Street, Chester, Pennsylvania.

SIR: You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $11,173.05, as shown in the statement attached.

9 In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By (Sgd.) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870
BH-1

10 STATEMENT

IT:AR:B-1
ARM-60D

In re: Mr. Richard B. Turner, 511 Welsh Street, Chester, Pennsylvania

Tax liability

Year	Tax liability	Tax assessed	Deficiency
1928	$12,220.39	$1,047.34	$11,173.05

The basis of this deficiency was set forth in a Bureau letter dated December 17, 1930, which is hereby made a part of this letter.

A copy of this letter is being mailed to Mr. James L. Rankin, 12–14 East Fifth Street, Chester, Pennsylvania, in accordance with the authority conferred upon him in power of attorney executed by you and on file with this office.

11 Before United States Board of Tax Appeals

Answer

Filed April 11, 1931

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies that Commissioner erred as alleged in paragraphs 4 (a) to (e), inclusive, of the petition.
5. Denies the allegations contained in paragraphs 5 (a) to (j), inclusive, of the petition.

Denies generally and specifically each and every allegation set forth in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

PHILIP M. CLARK,
Special Attorney,

Bureau of Internal Revenue.

12 Before United States Board of Tax Appeals

Motion to amend petition

Filed April 27, 1932

Now comes petitioner by its attorney of record and moves that the concluding prayer of the original petition be amended to read as follows:

"Wherefore, the petitioner prays that this Board may hear the proceeding and determine

"(a) That the profit to be included in the taxpayer's income for 1928 on account of sales of U. G. I. stock should be reduced from $92,854 as determined by the Commissioner, to not more than $25,933.50, or if it cannot identify the particular 1,300 shares which were sold in 1928 at the above-mentioned prices, then

"(b) That there was no profit on the sale of any of said stock until out of the proceeds of sales there had first been recovered the total cost of all shares of such stock on hand at the time of such sale, or if it cannot so hold, then

"(c) That art. 58 of regulations 74, insofar as it may be deemed by its terms to be applicable to the facts of this case, is unreasonable and invalid, and the basis should be computed by pooling the cost of all shares on hand at the time of each sale, or if it cannot so hold, then

"(d) That art. 58 of regulations 74, if applicable, must be strictly applied according to its terms, and particularly that none of the stock sold shall be charged against stock which had been received as stock dividends."

Respectfully submitted.

JAMES CRAIG PEACOCK,
Attorney for Petitioner.
1366 National Press Bldg., Washington, D. C.

EXCERPT FROM TRANSCRIPT OF HEARING APRIL 27, 1934

The MEMBER. The amendment to the petition is granted.

13 Before United States Board of Tax Appeals

Suggestion of death and motion to substitute

Filed April 27, 1932

Now comes James Craig Peacock, attorney of record, for petitioner in this case, and suggests to the Board the death of the said petitioner, Richard B. Turner, on February 21, 1932, and moves the sub-

stitution as petitioner of the Estate of Richard B. Turner, deceased. A certificate of the appointment of James L. Rankin as sole executor of the said estate by the Orphans' Court of Delaware County, Pennsylvania, is attached to the original of this motion.

Respectfully submitted.

JAMES CRAIG PEACOCK,
1366 National Press Bldg., Washington, D. C.

Granted April 27, 1932.

(Sgd.) CHARLES P. SMITH,
Member, U. S. Board of Tax Appeals.

14 Before United States Board of Tax Appeals

Order amending caption

Filed September 23, 1932

At the hearing of this proceeding on April 27, 1932, counsel for the petitioner suggested the death of the petitioner, on February 21, 1932, and moved that the executor, James L. Rankin, be substituted as petitioner. The premises considered, it is

Ordered that the motion be granted and that the caption of the petition be amended to read "James L. Rankin, Executor of the Estate of Richard B. Turner, deceased."

(Sgd.) CHARLES SMITH,
Member.

Before United States Board of Tax Appeals

Order to vacate

Filed October 4, 1932

It appearing that the suggestion of death and motion to substitute filed by counsel for the petitioner in the above-entitled proceeding on April 27, 1932, was granted on that date, and that in error an order was entered by the Board on September 23, 1932, granting a substitution of party, it is

Ordered that the order of the Board entered September 23, 1932, be and the same is hereby vacated and set aside and that the caption of the petition read "Estate of Richard B. Turner, deceased," as granted in the motion of counsel for the petitioner on April 27, 1932.

(Sgd.) CHARLES P. SMITH,
Member.

15 26 B. T. A. —

Before United States Board of Tax Appeals

Docket No. 53554. Promulgated October 14, 1932

ESTATE OF RICHARD B. TURNER, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Where the decedent in 1926 and 1928 purchased on margin through a broker at various times sundry lots of stock of United Gas Improvement Co., and in 1928 sold through the broker a portion of the stock thus held on margin, the respondent's determination that he sold those first acquired is approved.

James C. Peacock, Esq., for the petitioner.

J. M. Morawski, Esq., for the respondent.

Findings of fact and opinion

Filed October 14, 1932

This is a proceeding for the redetermination of a deficiency in income tax of decedent for 1928 of $11,173.05. The question presented by this proceeding is whether a sale of a portion of the number of shares of stock, owned by the petitioner through a broker on margin, shall be applied against the latest shares purchased or against the first shares purchased.

16 *Findings of fact*

1. The decedent, who died subsequent to the filing of the petition in this case, was during the taxable year here involved and for many years prior thereto president and principal owner of the Turner Supply Co., Chester, Pa. From 1924 until his death in 1932, he was sick, and from 1928 on blind, and his two closest business associates (one was his personal attorney and also the secretary of the company, and the other was manager of the company) had to and did handle a great many of his personal affairs, including the transactions hereinafter referred to.

2. Early in 1926, a distribution in kind was made of the estate of the decedent's father, at which time he received as a part of his share of the estate about $20,000 in bonds. He did not believe in bonds as an investment and desired to change his inheritance from his father from bonds into stock. He had several friends who were interested in United Gas Improvement Co. of Philadelphia, and after conversations with them decided to purchase as many shares of stock of the United Gas Improvement Co. as the funds to be obtained from the sale of his bonds would warrant. At his direction his attorney opened for him a marginal account with West & Com-

pany, a brokerage firm, and with the proceeds of the bonds he purchased on margin during the early part of 1926, 1200 shares of United Gas Improvement Co. stock at a total cost of $117,202.50.

3. On November 22, 1926, decedent was credited by his broker with 300 shares of United Gas Improvement Co. stock as a stock dividend on the 1200 shares which he had purchased, making a total of 1500 shares of that stock held on margin on December 31, 1926.

17 4. During 1927 the decedent had no marginal transactions in this or any other stock and took no active part in the market and at the end of that year his margin account showed 1,500 shares of United Gas Improvement Co. stock long. On June 8, 1928, the decedent bought through the same broker on margin 1,000 shares of United Gas Improvement Co. stock costing $143,225.

On May 8, 1928, the decedent gave orders to his broker to sell 300 shares of United Gas Improvement Co. stock, which was sold for $44,619 net. On October 22, 1928, he sold an additional 500 shares of the same stock for $73,865, and on November 7, 1928, an additional 500 shares for $74,115, making a total selling price for all of this stock sold in 1928 of $192,599.

The respondent included in decedent's income for 1928 the sum of $92,864, representing profit on the sale of 1,300 shares of United Gas Improvement Co. stock in 1928. The profit was computed as follows:

The cost of the 1,300 shares was computed at $99,735 by taking the earliest purchases in 1926 together with the 25 percent stock dividend on each such purchase as follows:

125	shares	(100+25) cost	$9,020
625	"	(500+125) "	44,475
125	"	(100+25) "	9,095
425	"	"	37,145
1,300			$99,735

This last item was computed by taking the cost of the 400 shares bought June 14, 1926 ($43,700); adding 100 shares received as a stock dividend, which would give a total of 500 shares; dividing 500 into the cost of $43,700, which would give a cost per share of $87.40; and multiplying this $87.40 by 425 (the number of shares necessary to make up the total of 1,300 shares) would give a

18 cost of $37,145 as above. The total cost of $99,735 computed as above, when deducted from the total selling price of $192,599, leaves a profit of $92,864.

The decedent always intended to retain the ownership on margin of 1,200 shares of the United Gas Improvement Co. stock since he had faith in the company and desired to hold that in lieu of the bonds which he had received from the estate of his father. In giving orders to his broker to sell 1,300 shares of the stock in 1928, the decedent did not specify any particular shares to be sold. An employee of the broker understood, however, that the decedent desired to retain 1,200 shares to take the place of the bonds which he had

received from his father. The decedent had made it plain to his associates that the 1,200 shares were in the nature of a permanent commitment on his part.

Opinion

SMITH. It is the contention of the petitioner in this proceeding that since it was the intention of the decedent to retain 1,200 shares of the United Gas Improvement Co. stock as an investment, and that since that intention was understood by his associates who gave the orders to purchase and sell the stock and by an employee of the brokerage concern, it must be assumed that the 1,300 shares that were sold by the broker in 1928 represented the 300 shares received as a stock dividend and in addition the 1,000 shares purchased by the decedent on June 8, 1928. The respondent rejected such contention in accordance with article 58 of regulations 74, which provides, so far as material, as follows:

"*Sale of stock and rights.*—When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale from the cost or other basis of the stock will constitute gain. In the case of stock in respect of which any stock dividend was paid, the basis for determining gain or loss from a sale of a share of such stock shall be ascertained in accordance with the principles laid down in article 600. . . ."

The evidence indicates that the decedent in the case at bar assumed that when he purchased shares of stock on margin a certificate for a given number of shares was acquired by him and retained by the broker. When the respondent first claimed that the decedent owed an additional tax for 1928, he, through his attorney, went to the broker's office to ascertain what certificates of stock were carried to the credit of the decedent and what certificates were actually sold for him in 1928. He learned that no certificates were earmarked for the decedent on the broker's books of account and that the broker could not advise him as to any specific certificates of stock that were purchased for him in the years 1926 and 1928. The character of the transaction is stated by the Circuit Court of Appeals for the Third Circuit in Snyder v. Commissioner, 54 Fed. (2d) 57, in the following language:

". . . The evidence of the transaction and of the customer's ownership is merely a book entry of a debit of the shares purchased against a credit of the margin paid. The shares are commingled with perhaps many thousand held by the broker for other customers, subject always to be hypothecated by him in raising the difference in money between the customer's margin and the purchase price of the shares, which of course the broker must pay in order to get a certificate. The shares are not delivered or earmarked or allocated to the customer even on the books."

20 The facts in the above referred to case are substantially the same as those which obtain in the proceeding at bar. In that opinion the court affirmed the decision of the Board in John A. Snyder, 20 B. T. A. 778. See also Skinner et al. v. Eaton, 34 Fed. (2d) 575, affirmed 45 Fed. (2d) 568, certiorari denied 51 S. Ct. 486.

The contention of the petitioner that article 58 of regulations 74 does not apply to the facts in this case and that if it does to that extent it is unreasonable and invalid is sufficiently answered by the decisions above referred to.

The petitioner makes the further contention that if the shares sold cannot be identified then under the general principles of law there was no profit on sales of these shares until the entire capital investment therein had been recovered. Petitioner relies upon Burnet v. Logan, 283 U. S. 404. In our opinion there is no merit for such a contention. Manifestly, shares of stock represent divisible interests in a corporation and where a person sells one or more of a lot of shares owned he may sustain a gain or loss in respect of that transaction.

Judgment will be entered for the respondent.

Before United States Board of Tax Appeals

Decision

Entered October 17, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated October 14, 1932, it is

Ordered and decided: That there is a deficiency of $11,173.05 for the year 1928.

(Sgd.) CHARLES P. SMITH,
Member.

21 In United States Circuit Court of Appeals for the Third Circuit

B. T. A. No. 53554

ESTATE OF RICHARD B. TURNER, DECEASED, PETITIONER ON REVIEW

v.

COMMISSIONER ON INTERNAL REVENUE, RESPONDENT ON REVIEW

Petition for review

Filed January 6, 1933

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the Estate of Richard B. Turner, deceased, by its attorney, James Craig Peacock, and respectfully shows:

This appeal was taken to the Board of Tax Appeals from a proposed deficiency of $11,173.05 in the income tax of Richard B. Turner

for 1928, Mr. Turner having filed the petition before his death on February 21, 1932. During 1926 Mr. Turner purchased on margin 1,200 shares of U. G. I. stock (on which he later received a 25 per cent. stock dividend of 300 shares). During 1928 he sold 300 shares and also purchased on margin 1,000 shares of the same stock. Later in 1928 he sold 1,000 shares of U. G. I. stock. The sole issue is the basis to be used in computing the profit on the sale of the 1,300
22 shares. The respondent arbitrarily used the cost of the first 1,040 shares purchased in 1926, which with 260 shares received as a 25 per cent stock dividend thereon totals 1,300 shares. The petitioner contends that the 300 stock dividend shares and the 1,000 shares bought in 1928 were the 1,300 shares sold in that year and that they have been identified as such; and also that for other reasons the respondent's computation of cost is in any event erroneous. The Board of Tax Appeals sustained the respondent's determination.

The Estate of Richard B. Turner, deceased, was on April 27, 1932, substituted as petitioner.

The decedent was an inhabitant of Pennsylvania and filed his income tax return for 1928 with the collector of internal revenue at Philadelphia, Pennsylvania, and the sole executor of his estate, James L. Rankin, is also an inhabitant of Pennsylvania. Review of the Board's decision is therefore sought in the United States Circuit Court of Appeals for the Third Circuit in accordance with the provisions of section 1002 of the Revenue Act of 1926.

The petitioner assigns the following errors in the determination and the decision of the Board:

1. The Board erred in holding that the 1,300 shares sold in 1928 were the first 1,040 shares purchased together with 250 shares received as a stock dividend thereon.

2. The Board erred in holding that the basic cost of the shares sold was $99,735.

3. The Board erred in failing to hold that the 1,300 shares sold were the 300 shares received or credited as a stock dividend on November 22, 1926, and the 1,000 shares subsequently purchased.
23 4. The Board erred in failing to hold that the 1,300 shares sold had been identified as said 300 stock dividend shares and said 1,000 subsequently purchased shares.

5. The Board erred in holding that the basic cost of the 1,300 shares sold was less than $166,665.50.

6. The Board erred in failing to find that the basic cost of the 1,300 shares sold was at least $166,665.50.

7. The Board erred in holding that article 58 of regulations 74 applies to the facts of this case.

8. The Board erred in failing to hold that article 58 of regulations 74 is unreasonable and invalid if it by its terms applies to the facts of this case.

9. The Board erred in failing to hold that, if the 1,300 shares sold cannot be identified, then there was no profit on the sale of any shares until there had first been recovered the total cost of all shares of such stock on hand at the time of such sale.

10. The Board erred in failing to hold that, even if article 58 of regulations 74 is valid and applicable to the facts of this case, nevertheless by its very terms no part of the stock sold may be charged against the 300 shares of stock received as a stock dividend.

11. The Board erred in failing to find as a fact that the 1,300 shares sold in 1928 were the 300 shares received as a stock dividend November 22, 1926, and the 1,000 shares purchased June 8, 1928.

12. The Board erred in failing to find as a fact that it was the 1,200 shares purchased in 1926 that the decedent always intended to and did retain as an inheritance from his father.

24 13. The Board erred in failing to find as a fact that beginning in March 1928 the decedent for the first time began active buying and selling of stocks in his margin account and that in addition to the purchase of 1,000 shares of U. G. I. stock in June and the sale of 300 shares, 500 shares, and 500 shares of that stock in May, October, and November, respectively, he in March bought and sold 1,000 shares of General Motors and also bought 1,000 shares of Packard; in April bought 2,000 shares of Public Service of New Jersey; in May sold the Packard and Public Service stock as well as the above mentioned 300 shares of U. G. I. stock with the result that at the end of May the account contained only 1,200 shares of U. G. I. stock long; in June bought 1,000 shares of General Motors and 500 shares of Hudson Motors in addition to the above-mentioned 1,000 shares of U. G. I. stock; in July sold the General Motors and 500 shares of Hudson and also bought 500 more shares of General Motors; and during the remainder of the year was even more actively buying and selling General Motors, Hudson Motors, National Power & Light, Consolidated Gas, Stanley, Electric Power & Light, Chrysler, U. S. Steel, Studebaker, Victor Talking Machine, Sun Oil, Keith-Albee, Shubert, Pennsylvania Railroad, Curtis, Kolster Radio, and A. M. Byers, mostly in 500 or 1,000 share lots.

14. The Board erred in failing to find as a fact that during 1928 decedent frequently consulted his attorney about his stock transactions and was constantly advised by the latter to sell because he believed that prices were too high; that he followed his attorney's advice as to most of his transactions except with regard to the 1,200 shares of U. G. I. stock which he had purchased in 1926; that he constantly stated to his attorney and to his other associates

25 that he regarded it as his inheritance from his father and as a permanent investment and that he would not sell it; that he conferred with the manager of the company about his stock holdings at least once a week during that year and often discussed with him the difference between his first 1,200 shares of U. G. I. stock and the shares which he subsequently bought; that there were two other friends who also visited him frequently at his country place and whenever any of the four were with him the conversation almost always was largely about U. G. I. and he constantly reiterated that the original 1,200 shares were a permanent holding but that the other shares of that stock he had bought with the hope of making a profit

by selling them; that in computing the possible profit for the purpose of deciding whether or not to sell the 1,200 shares in 1928 the taxpayer calculated it on the basis of the cost of the 1,000 shares purchased in that year, having no thought or intent that he was selling anything but those shares and in this connection he gave no thought whatever to the stock bought in 1926; and that about the middle of December 1928, he made an accurate calculation of his profit on this transaction on the same basis and reported the profit so computed in his income tax return for that year.

15. The Board erred in failing to find as a fact that from the very beginning West & Company knew the taxpayer's intentions and that he was keeping the first purchase of 1,200 shares; and that they had been so advised by his attorney, and at the time of the sale of the first 500 shares of the 1,000 shares sold late in 1928 they knew that the taxpayer understood that the sale was out of the 1,000 shares purchased during that year and that he still had the original 1,200 shares.

16. The Board erred in failing to find as a fact that decedent
26 frequently made memorandums of his stockholdings with the prices at which he would sell them and that he made such a memorandum in which he noted such a price after every item except the 1,200 shares of U. G. I. stock.

17. The Board erred in failing to find as a fact that decedent always intended to and did retain the 1,200 shares of U. G. I. stock which he purchased in 1926.

18. The Board erred in failing to find as a fact that decedent intended to and did sell in 1928 the 300 stock dividend shares and the 1,000 shares of U. G. I. stock which he purchased in that year.

19. The Board erred in entering judgment for respondent.

Wherefore, the petitioner prays that the determination and decision of the Board in this case be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that a transcript of record be prepared in accordance with the law and the rules of said court and transmitted to the clerk of the said court, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

JAMES CRAIG PEACOCK,
Attorney for Petitioner.

27 [*Duly sworn to by James Craig Peacock, jurat omitted in printing.*]

28 BEFORE UNITED STATES BOARD OF TAX APPEALS

Statement of evidence

Filed January 23, 1933

The above-entitled cause came on for hearing before the United States Board of Tax Appeals on April 27, 1932, James Craig Peacock representing the petitioner and J. M. Morawski representing the re-

spondent. The following is a statement of all of the evidence which is essential to the decision of the questions raised by the assignments of errors set out in the petition for review by this court.

Stipulation as to certain facts

It was stipulated as follows:

"It is stipulated by the parties that the petitioner made the following purchases of United Gas and Improvement Company stock in 1926 on margin through West and Company, brokers of Philadelphia:

Bought March 30, 1926, 100 shares, cost	$9,020
Bought March 31st, 1926, 500 shares, cost	44,475
Bought April 5th, 1926, 100 shares, cost	9,095
Bought June 14th, 1926, 400 shares, cost	43,700
Bought June 14, 1926, 100 shares, cost	10,912.50

"On November 22d, 1926, the petitioner received 300 shares as a 25 per cent. stock dividend, making a total held on margin on December 31, 1926, of 1,500 shares.

"The petitioner had no marginal transactions in this stock in 1927.

"On December 31, 1927, the petitioner's margin account showed 1,500 shares of United Gas and Improvement Company stock long.

"It is further stipulated that on June 8th, 1928, the petitioner bought 1,000 shares of United Gas and Improvement stock on margin costing $143,225.

"It is stipulated that the following sales were made on margin of United Gas and Improvement Company stock:

"May 8th, 1928, sold 300 shares for $44,619.

"Oct. 22d, 1928, sold 500 shares, of United Gas Improvement Company stock for $73,865.

"November 7th, 1928, sold 500 shares United Gas Improvement Company stock $74,115, making a total selling price of $192,599.

"It is further stipulated in computing the deficiency the respondent included in petitioner's income for 1928 the sum of $92,864 representing profit on the sale of 1,300 shares of United Gas and Improvement Company stock in 1928. The profit was computed as follows:

"The cost of the 1,300 shares was computed at $99,735 by taking the earliest purchases in 1926 together with the 25 per cent. stock dividend on each such purchase as follows:

125	shares	(100+ 25)	cost $9,020
625	"	(500+125)	" 44,475
125	"	(100+ 25)	" 9,095
425	"		" 37,145
1,300	"		" $99,735

This last item was computed by taking the cost of the 400 shares bought June 14, 1926 ($43,700); adding 100 shares received as a stock dividend which would give a total of 500 shares; dividing 500 into the cost of $43,700 which would give a cost per share of $87.40;

and multiplying this $87.40 by 425 (the number of shares necessary to make up the total of 1,300 shares) would give a cost of $37,145 as above. The total cost of $99,735 computed as above when deducted from the total selling price of $192,599, leaves a profit of $92,864."

30 JAMES L. RANKIN, witness for the petitioner, testified as follows:

Since 1913 I have been the decedent's sole attorney and also secretary of the Turner Supply Company of which he was president and principal owner. I acted also as attorney for his father's estate which was closed and distributed in kind in the spring of 1926. As part of such distribution decedent received about $20,000 of bonds. Decedent told me that he had decided to open an account with a Philadelphia brokerage house to sell these bonds and use them as the basis for purchasing U. G. I. stock. I recommended West & Company and at his request made the arrangements for opening the account procuring the usual form of marginal agreement which he signed and I returned to West & Company. At his request I directed them to purchase U. G. I. stock and I sent them the $20,000 of bonds and some cash, I think upwards of $2,000.

Decedent told me several things in explanation of his instructions, some of which I knew anyhow. He told me of many conversations which he had had with one Thompson who had been associated with him in business and formerly employed by a company which was affiliated with the U. G. I. Company and of the recommendations made by one Morrisey, an engineer in the employ of the U. G. I. Company, that he buy that stock, and that it was those two things that led him to decide to buy U. G. I. stock. "He stated he regarded his purchase, or he wanted to regard the transaction as substituting the U. G. I. stock for the inheritance he received from his father. Mr. Turner did not believe in bonds and said he . . . wanted to change his inheritance from his father from the form of bonds into stock, and desired to purchase as many shares of
31 stock of the U. G. I. Company as the funds to be obtained from the sale of his bonds would warrant."

The instructions for these purchases were all given by letter or telephone to a Mr. Carey, who was employed with West & Company.

The decedent's very first purchase through West & Company was for 50 shares of U. G. I. stock outright, the certificates for which were delivered to him. His only purchase in that year other than U. G. I. stock was a purchase of 80 shares of Philadelphia Electric. In 1927 his only transactions were the sale of 15 shares of U. G. I. stock which he had received as a stock dividend on the said 50 shares and on 10 other shares which he had received from his father's estate, and a sale of a few shares of the Philadelphia Electric stock. In March 1928 the situation changed and he began to buy a number of stocks in this account, including some additional purchases of U. G. I. stock. On March 14 he bought 1,000 shares of General Mo-

tors, and on March 27 he sold 1,000 shares of General Motors. On March 26 he bought 1,000 shares of Packard, and at the end of March 1928 was long the 1,500 shares of U. G. I. and 1,000 shares of Packard. That was the first change in the account of any consequence. In April he bought 2,000 shares of Public Service of New Jersey. In May he sold 2,000 shares of Public Service of New Jersey, 1,000 shares of Packard, and 300 shares of U. G. I. stock so that at the end of May 1928 he was long 1,200 shares U. G. I. On June 8 he bought 1,000 shares of U. G. I., on June 11, 400 shares of General Motors, and on June 12, 600 shares of General Motors and 500 shares of Hudson. On July 2 he sold 1,000 shares of General Motors. On July 17 he bought 500 shares of General Motors. On August 9 he bought 500 shares of General Motors and on August 10, 500 shares of Hudson. On August 17, he sold 500 shares of General
32 Motors. On September 6 he bought 500 shares of National Power and Light, on September 10, 500 shares of Consolidated Gas and on September 14, 1,000 shares of Stanley. On September 15 he sold 500 shares of Hudson, on September 25, 500 shares of Hudson, and on September 26, 500 shares of National Power and Light. On September 27 he bought 1,000 shares of Electric Power and Light and 500 shares of Chrysler, and on September 28 he bought 500 shares of General Motors. On October 8 he bought 500 shares of General Motors and sold 500 shares of Chrysler. On October 19 he bought 500 shares of United States Steel and sold 1,000 shares of General Motors. On October 22 he sold 500 shares of U. G. I. On October 26 he bought 1,000 shares of Studebaker. During November he bought Victor Talking Machine, Sun Oil, Keith-Albee, Shubert, Pennsylvania Railroad, and Curtis stock and sold U. G. I. and Victor stock. On December 10 he sold 8,500 shares in all of Keith-Albee, Curtis, Consolidated Gas, Pennsylvania Railroad, Shubert, Stanley, Studebaker, Victor, and Electric Power and Light. He sold additional shares of General Motors, United States Steel, and Victor, and bought Victor, Chrysler, A. M. Byers, Packard, Curtis, and Kolster Radio stock, so that on December 31, 1928, he was long 1,200 shares of U. G. I., 200 shares of Kolster, and 100 shares each of United States Steel, General Motors, Victor, Chrysler, Packard, Curtis, Sun Oil, and A. M. Byers.

Decedent consulted me about these purchases and sales and during 1928 I many times advised him to sell everything he had. Decedent told me, however, that he was not willing to sell the 1,200 shares of U. G. I. stock which he had purchased in 1926 but he would fix a price at which he would sell the others. He would give instructions that when a stock reached a certain point going up to sell and if it dropped to a certain point to sell. He said he regarded the
33 1,200 shares of U. G. I. stock as an inheritance from his father. He had sentimental reasons in regard to it and was not interested in its real financial value and regarded it as a permanent investment.

On cross-examination the witness testified as follows:

Decedent never received any certificates. West & Company would send a memorandum with respect to each purchase and sale. He just gave an order to the broker buy or to sell so many shares and received the notice the following day that so many shares were bought or sold.

"Q. So far as you were concerned you were not selling any particular shares of the stock?

"A. Yes, so far as Mr. Turner was concerned, he was selling the 1,000 shares he purchased in 1928. It was never his intention to change his position with respect to this 1,200 shares he purchased in 1926.

"Q. Yes, but wasn't that only a mental thought on his part; did it make any difference whether he was selling the 1,200 shares purchased in 1926 or the 1,000 shares purchased in 1928—he did not have any of the certificates?

"A. So far as Mr. Turner was concerned and West & Company were concerned they knew his desires and feelings about the 1,200 shares of U. G. I. For myself I had discussed it with Mr. Carey of West & Company, and he knew Mr. Turner's feelings about that, the 1,200 shares."

I never knew in what form West & Company had title to the certificates of stock. They were not in the name of the decedent. The dividends that were declared were received by West & Company and credited to the decedent's account "but from the very beginning West & Company knew Mr. Turner's intentions, and knew he was keeping the first purchase of 1,200 shares."

34 Until this question was raised by the Government neither decedent nor I knew how West & Company handled these transactions. I went to West & Company two years after the transaction to find out from them a record of the certificates they had representing the original 1,200 shares. I expected they could tell me the number of certain certificates for 1,200 shares and for the first time learned that they could not. They told me that they cleared through a clearing house and always kept or had certificates for exactly the number of shares that all of their customers were long but they could not say that certain certificates or certain numbers were the decedent's. Both decedent and I thought that they had particular certificates which represented the 1,200 shares, the 500 shares, and the other 500 shares and the first we knew that was not so was after the agent had audited decedent's accounts.

"Q. You say that Mr. Turner regarded these shares purchased in 1926 as an inheritance from his father—in other words he had used the money I presume that he got from his father's estate to put up as margins for the purchase of these stocks in 1926?

"A. Yes, sir.

"Q. That would not as a matter of fact make any difference what 1,200 shares he regarded as inheritance from his father, whether

at the end of 1928 he still had 1,200 shares reserved in the margin account, so far as his intent was it would have been fulfilled by the holding of any of the shares that were purchased?

"A. No, sir, in Mr. Turner's mind he was so constituted that I know of many instances in our own contact—for instance, there was a certain piece of furniture that was not worth a dollar in his home,—he leased his home to a man, and when the man moved out that piece of furniture was not there, and it did not satisfy
35 him to return the value of the furniture. He wanted the particular piece of furniture, and it is in his own mind he had that certain thought that he wanted these particular 1,200 shares."

When we put in an order to sell we merely said to sell 500 shares. Decedent had in his own mind that it was the 500 shares of the 1,000 shares he had purchased in that year and Mr. Carey knew that decedent felt in his mind that he still had that 1,200 shares. Neither decedent nor I thought it necessary to say anything more, for Mr. Carey knew his position and realized decedent's desires were genuine, and decedent felt it unnecessary to tell him which 1,000 shares he sold.

"Q. It would make no particular difference, so far as he was concerned; he would still have 1,200 shares?

"A. According to his own idea it would make a material difference, for that 1,200 shares was a different transaction, not to be touched. In other words, it is like two lumps of sugar; they might be the same thing, but one lump might have a particular meaning, and while the second one would not have.

"Q. It was mere intention on his part, that is all it amounted to?

"A. Intention and his own way of bookkeeping, and keeping of the records in his own mind of what he had.

"Q. Outside of that it had no substance except what was in his own mind?

"A. Well, also this he knew at the times of the sale of his own gains and losses for the year, for I calculated them and those sales were made, calculated the stocks that were being sold were the stocks purchased in that year, for we made the calculation of what the expense was by way of gain or loss on the sale."

Very frankly we never dreamed of the possibility that they
36 would regard this as the sale of the earlier purchases. We got West & Company's statements and calculated all purchases and sales already made to determine whether he should sell more stock or not, and we gave no thought at all to the stock bought in 1926 because in his mind and in my mind what he sold was the very same stock that he had purchased in this particular year. About the middle of December 1928 we made as accurate a calculation as we could at that time of his gross income, and entered his deductions, and based the tax on his expenses and experience up to that time.

THOMAS MCDOUGAL, witness for the petitioner, testified as follows:

I am manager of the Turner Supply Company. Decedent was sick more or less from 1924 and was quite blind from 1928 on, and therefore I had to handle a great many of his personal affairs. I had complete knowledge of the marginal account in which U. G. I. was bought and sold. In most of our trips to the doctor we spent the time in a complete discussion of this account. From time to time I would have to get him quotations and check up on his holdings, and I conferred with him thoroughly once a week. I knew from many conversations with him about the sales of U. G. I. stock in 1928. He had a very definite idea in his own mind as to what stocks he was selling and what stocks he was keeping, and he often discussed with me the difference between his first 1,200 shares and the shares he subsequently bought. In all of my conversations with him he talked about the difference in these holdings.

"Q. Did he explain any distinction in his holdings?

"Mr. MORAWSKI. I object, Your Honor. This calls for hearsay testimony.

37 "The MEMBER. Objection overruled.

"Mr. MORAWSKI. We note an exception.

"The MEMBER. Exception noted.

"A. These conversations were all direct from Mr. Turner to me. I being manager of the Turner Supply Company was very much in close touch to Mr. Thompson, and this U. G. I. proposition in the beginning was discussed from time to time before Mr. Turner bought, and Mr. Thompson had a friend with the Gas Company, Mr. Shaddock, and Mr. Turner always asked him to get in touch with Mr. Shaddock and that was before he bought, and I know how deeply he went into the U. G. I. problem, and he always thought this U. G. I. was an investment proposition. Then when Mr. Massey came to live at Chester Club, Mr. Turner had a place in Elkton, and Mr. Massey visited with him, quite a good deal, and I used to go down there on Saturday after the day's work was over, and Mr. Turner always had work around the place, and the main part of the conversation was U. G. I.

"Q. In 1928 at the time these sales took place, did he then explain any distinction between this original 1,200 shares, and the other stock?

"A. Yes, sir; he did.

"Mr. MORAWSKI. I object to that question, Your Honor, on the ground that it calls for hearsay testimony.

"The MEMBER. Objection overruled.

"Mr. MORAWSKI. We note an exception.

"The MEMBER. Exception noted.

"A. Always the stock that he bought in 1928 he stated that he bought this stock to deal actively in. He suggested, or he talked to me that this U. G. I. stock that he bought that year was just the same

as any other stocks that he bought. He bought with the hopes of making a profit and selling them, but he never relinquished the
38 idea of this original 1,200 shares in all our conversations when we would go over at the end of the month his holdings he expressed that, and there was no doubt in my mind that it was very clear to him the difference between the two classes of the U. G. I. stock he held."

At this point witness identified a memorandum in decedent's handwriting made approximately in November 1928, which was admitted in evidence as exhibit no. 1 and pointed out that the third item from the bottom is the U. G. I. stock. On all of the others he has the word "sell" which indicates the number of shares he was willing to sell but on this there is a blank. The 1,200 shares of U. G. I. which he held at that time he did not have any price on or any intention of selling when he made this memorandum. I know this because he constantly made memoranda of this kind to check his holdings. I know that he did not intend to sell these 1,200 shares.

On cross-examination the witness testified as follows:

In those conversations with decedent he always separated these 1,200 shares and he never talked in any other way than that was the thought in his mind and those shares had nothing to do with the stock he subsequently bought and sold. When he bought these shares he did not actively operate in the market, and he did not actively operate until over a year afterwards and that was a different proposition. He then was sick and had arthritis and was away from his business and had all day to himself and he played the market. He bought and sold these other shares as a profitable pastime. I never saw any certificates of stock.

Approved, settled, and ordered filed this 23rd day of January 1933.

(S.) CHARLES P. SMITH,
Member, United States Board of Tax Appeals.

39 Before United States Board of Tax Appeals

Praecipe for transcript of record

Filed January 27, 1934

To the Clerk of the United States Board of Tax Appeals:

You are requested to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Third Circuit a certified copy of the record in the above-entitled case, including therein copies of the following:

1. Docket entries.
2. Petition.
3. Answer.
4. Motion to amend petition and notation that same was granted (see transcript of hearing, page 5).

5. Suggestion of death and motion to substitute and order of April 27, 1932, granting same.
6. Order of September 23, 1932.
7. Order of October 4, 1932.
8. Findings of fact and opinion.
9. Decision.
10. Petition for review.
11. Statement of evidence.
12. This praecipe.

JAMES CRAIG PEACOCK,
Attorney for Petitioner.

Service of a copy accepted and praecipe agreed to.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

40 [Clerk's certificate to foregoing transcript omitted in printing.]

41 In United States Circuit Court of Appeals for the Third Circuit

Stipulation as to substitution

Filed March 5, 1934

Whereas, pending the hearing of this case before the Board of Tax Appeals the taxpayer, Richard B. Turner, died on February 21, 1932; and

Whereas, on February 25, 1932, James L. Rankin duly qualified as Executor for the said Estate of Richard B. Turner, Deceased, and is now, and at all times has been, the duly qualified and acting executor of said estate; and

Whereas, on October 4, 1932, the Board of Tax Appeals substituted as petitioner "The Estate of Richard B. Turner, Deceased"; and

Whereas, on October 17, 1932, the Board of Tax Appeals entered a decision against the Estate of Richard B. Turner, Deceased; and

Whereas, on January 6, 1933, the "Estate of Richard B. Turner, Deceased", filed a petition for review with the Court of Appeals of the District of Columbia and at the same time filed a petition for review with the Circuit Court of Appeals for the Third Circuit; and

Whereas, on January 2, 1934, the Court of Appeals of the District of Columbia dismissed said petition filed with that court, on the ground that it was without jurisdiction; and

42 Whereas, James L. Rankin, executor of the Estate of Richard B. Turner, Deceased, has filed with the Circuit Court of Appeals for the Third Circuit a motion to substitute himself for said

"Estate of Richard B. Turner, Deceased", as petitioner, notwithstanding that the time for filing a new petition has expired; and

Whereas, the parties hereto desire that the case be decided on its merits without further controversy over technical questions:

Now, therefore, in consideration of the respondent acquiescing in the pending motion for the substitution of the said James L. Rankin, executor, as petitioner, the said James L. Rankin agrees, for himself in his capacity as such executor, and for the Estate of Richard B. Turner, deceased, that in the event the Circuit Court of Appeals for the Third Circuit entertains jurisdiction of this proceeding and the decision below is finally affirmed on its merits, then, unless collection has then been made, the tax involved in this proceeding will be paid promptly and neither party shall hereafter raise any question as to proper or necessary parties in this case.

JAMES L. RANKIN,
Executor of the Estate of Richard B. Turner, Deceased.

MARCH 5th, 1934.

J. P. JACKSON,
Attorney for the Respondent.
JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Attorneys for James L. Rankin as Executor of the Estate of Richard B. Turner, Deceased.

43 United States Circuit Court of Appeals for the Third Circuit

No. 5424. March term, 1934

ESTATE OF RICHARD B. TURNER, DECEASED, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Upon consideration of the motion of petitioner filed herein on the 26th day of February 1934 and the consent thereto of counsel for the respondent, it is by the court, this 5th day of March 1934,

Ordered, adjudged, and decreed that James L. Rankin, as executor of the estate of Richard B. Turner, deceased, be, and he hereby is, substituted as party petitioner herein and the caption of this case shall be corrected accordingly.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

We consent:

JNO. W. TOWNSEND,
Attorney for petitioner.
J. P. JACKSON,
Attorney for respondent.

44 United States Circuit Court of Appeals for the Third Circuit

No. 5424

ESTATE OF RICHARD B. TURNER, DECEASED, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Upon motion of the petitioner, expressly consented to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be, and he hereby is, substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

Dated: May 2, 1934.

J. W. THOMPSON,
U. S. Circuit Judge.

(Endorsements:) Order substituting Guy T. Helvering as Commissioner, etc. Rec'd & filed May 2, 1934. Wm. P. Rowland, clerk.

45 United States Circuit Court of Appeals for the Third Circuit

No. 5424. March term, 1934

JAMES L. RANKIN, EXR. OF THE ESTATE OF RICHARD B. TURNER, Deceased, petitioner
vs.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

And afterward, to wit, the 2d day of May 1934, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Victor B. Woolley, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterward, to wit, on the 18th day of September, 1934, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

46 United States Circuit Court of Appeals for the Third Circuit

No. 5424. March term, 1934

JAMES L. RANKIN, EXECUTOR OF THE ESTATE OF RICHARD B. TURNER, Deceased, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On petition for review from the United States Board of Tax Appeals

Opinion

Filed September 18, 1934

Before WOOLLEY, DAVIS, and THOMPSON, Circuit Judges

WOOLLEY, *Circuit Judge:*.

The Commissioner of Internal Revenue assessed a deficiency tax against Richard B. Turner for the tax year 1928. Turner petitioned the United States Board of Tax Appeals for a redetermination of the deficiency. His executor is here on petition to review the order of that tribunal sustaining the tax.

This case, like that of Snyder v. Commissioner, — Fed. (2d) —, arose out of confusion (this time by the Commissioner) in the terms "shares" and "certificates" in transactions of sale of stock on margin as affected by section 113 (a) of the Revenue Act of 1928 making cost the basis of taxation and by the administrative
47 regulation (article 58 of regulations 74) providing that:

"When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. * * *"

This is the familiar "First in, first out" rule and is to be applied in this case (as it was in both Snyder cases, 54 Fed. (2d) 57 and — Fed. (2d) —) according as the "shares" sold have or have not been identified as shares purchased in certain lots, not according to identification of certificates for the shares.

Identification being a matter of fact, the facts on that issue are these:

Early in 1926, Turner purchased on marginal account with a Philadelphia broker 1,200 shares of the stock of United Gas Improvement Company, known on the "street" as U. G. I. For nearly two years he had no further marginal transactions in this or any other stock. At the beginning of 1928 his marginal account was long 1,500 shares of U. G. I., the additional 300 shares representing a twenty-five per cent stock dividend credited to him late in 1926.

In 1928 Turner began playing the market. Included in many marginal transactions, not of present concern, he bought 1,000 shares of U. G. I. and at one time sold 300 shares, at another 500 shares, and at still another 500 shares of that stock. By the end of 1928 (the tax year) Turner's account was long 1,200 shares of U. G. I., the precise number he bought in 1926. The Commissioner in determining a deficiency tax applied the "First in, first out" rule on findings that of the 1,300 shares which the petitioner sold in 1928 (the tax year) 1,040 shares were out of the original 1,200 purchased in 1926 and 260 were a part of the stock dividend he received in that year, and that the total basis for computing gain or loss should thus be reduced from the taxpayer's figures (which he
48 reckoned, in part, on the sale of the 1,000 shares he had bought in the tax year) to $99,735, the cost of 1,300 shares first acquired by purchase and stock dividend, and the taxable profit should be correspondingly increased from $25,933.50 to $92,864, disclosing liability for a deficiency tax in the sum of $11,173.05.

If this were all there was in the case the deficiency tax and the theory of its assessment under the "First in, first out" rule would, without doubt, be right. But if there was "something else" in the case, as we said in Snyder v. Commissioner, 54 Fed. (2d) 57, 58, and it has to do with identification of the shares of U. G. I. sold in 1928 on whose gain the tax was levied, the assessment is open to question. There was something else; and it bore directly on identification of the shares and therefore on the application of the rule. The evidence on this point is substantially as follows:

Early in 1926 Turner received $20,000 in bonds as a distribution of his father's estate. He did not believe in bonds as an investment and desired to change his inheritance into stocks. Being in ill health, later becoming blind, he called in his attorney and directed him to have an account opened with a Philadelphia broker, have the broker sell the bonds and with the proceeds purchase on margin 1,200 shares of United Gas Improvement Company stock. This was done, the debit balance later being increased to 1,500 shares by the stock dividend, for all of which the broker held "street certificates"; that is, certificates in the names of other persons, endorsed in blank.

The evidence shows conclusively that Turner was sentimental about keeping the original 1,200 shares as an inheritance from his father; that his "intention" was to retain as an investment the shares originally purchased and sell in speculation the shares more recently acquired, which clearly was not enough to take the case out of
49 the rule. Snyder v. Commissioner, 54 Fed. (2d) 57; Snyder v. Commissioner, — Fed. (2d) —; Horner v. Commissioner, — Fed. (2d) —; Commissioner v. Merchants and Manufacturers Fire Insurance Company, — Fed. (2d) —; and that he made repeated declarations of that intention to his associates which, likewise was not enough. Skinner v. Commissioner, 45 Fed. (2d) 568.

Evidence of intention of the owner of shares in transactions of purchase and sale though not dispositive of the question of identifi-

cation has, nevertheless, a bearing on the ultimate question, what the owner did about it. Commissioner v. Merchants and Manufacturers Fire Insurance Company, — Fed. (2d) —; Howbert v. Penrose, 38 Fed. (2d) 577. What Turner did in this case, acting and speaking through his attorney, was to communicate to his broker his intention to hold for investment the shares of U. G. I. he originally purchased. His decisions to sell like shares later purchased were reached on that basis; his books and records were kept on that basis; and, accordingly, his income-tax return was made on that basis. The Commissioner, the Board of Tax Appeals affirming him, ignored this action of the petitioner on the theory that the U. G. I. stock, which from time to time he purchased on margin, and later sold, could be identified only by certificates; that as no certificates for shares were ever in his name, the shares sold could not be identified as shares purchased in any particular lot or at any particular time or price and, accordingly, charged the shares sold against those earliest purchased within the "First in, first out" rule.

That was error. What was bought and sold were shares, not certificates (discussed in Snyder v. Commissioner, — Fed. (2d) —; Meyer on The Law of Stock Brokers and Stock Exchanges, sec. 42).

Shares as distinguished from certificates are property subject
50 to conversion and capable of identification. We think the petitioner's communication to his broker of his intention to hold the 1,200 shares first purchased as an investment was in effect an order to his broker not to sell those shares, and when, two years later, he ordered the broker to make two sales in lots of 500 shares each, they were, conformably with the original instructions, the 1,000 shares last purchased. The petitioner's instructions excluding from sale the shares first purchased were in effect an identification of the shares later sold as those last purchased.

While the petitioner, in identifying his shares, might have been more specific in his instructions to his broker, those he gave stand uncontradicted; indeed, they have not been questioned. We think they were enough to take the case out of the rule and that, in consequence, the deficiency tax in issue is invalid to the extent that it is based on gains in sales of U. G. I. shares reckoned on the purchase price of the original 1,200 shares.

The order of the Board of Tax Appeals sustaining the deficiency tax assessed by the Commissioner is, for the reasons and to the extent indicated in this opinion, reversed.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

51 United States Circuit Court of Appeals for the Third Circuit

No. 5424. March term, 1934

JAMES L. RANKIN, EXR. OF THE ESTATE OF RICHARD B. TURNER, Deceased, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed to the extend indicated in the opinion of this court, with direction to the said Board of Tax Appeals to enter a new order in conformity with said opinion.

Philadelphia, September 18, 1934.

VICTOR B. WOOLLEY,
Circuit Judge.

(Endorsements:) Order reversing decree. Rec'd & filed Sept. 18, 1934. Wm. P. Rowland, clerk.

52 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct.:

I, Wm. P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of James L. Rankin, Exr. Est. Richard B. Turner, Deceased, petitioner, vs. Commissioner of Internal Revenue, respondent, No. 5424, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 10th day of December, in the year of our Lord one thousand nine hundred and thirty-four and of the independence of the United States the one hundred and fifty-ninth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[SEAL.]

53 Supreme Court of the United States

Order allowing certiorari

Filed February 4, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no. 39,210. U. S. Circuit Court of Appeals, Third Circuit. Term no. 582. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. James L. Rankin, Executor of the Estate of Richard B. Turner, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed December 15, 1934. File no. 582 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1935